No. 88-6186

In the
Supreme Court of the United States
October Term, 1988

RALPH J. ZOLA,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION and UNITED STATES

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF

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I

CLARIFICATION OF FACTS

Both parties agree that the facts of this case are not in dispute. However, the partial, and inflammatory, reportage of those facts contained in the reply of the Commission together with omission of key facts creates inaccuracies.

There were two AAACon proceedings, as required by the Interstate Commerce Act, 49 U.S. Code Sec. 10925. The first led to a cease and desist order in 1976 against certain anti-consumer conduct of AAACon in its automobile transport business. The second in 1984 led to a revocation to AAACon's carrier license.

In neither of the two AAACon proceedings was petitioner Zola made a party. Indeed, in the second AAACon proceeding, the Administrative Law Judge noted that inasmuch as he was not a party the orders in those proceedings did not "run against" him (4a, n.1).[1]

After the completion of both AAACon proceedings, Mr. Zola purchased the stock of another carrier, Natco, and continued in the auto transport business. That purchase was, as the Commission has acknowledged repeatedly, beyond its jurisdiction to approve or prohibit (47a, n.8). Two years later, in 1986, the Commission brought a proceeding against Natco and, for the first time, against Mr. Zola.

Significantly, in the Natco proceeding neither Mr. Zola nor Natco were charged with continuing the anti-consumer abuses of AAACon (34a, n.2; and 50a). Rather, they were charged simply with continuing the type of business AAACon had conducted—the automobile transport business. As the Third Circuit observed in the Zola/Natco proceeding, no evidence was permitted to be adduced, nor was there any charge that petitioner Zola or that Natco had continued the anti-consumer wrongful practices of AAACon (34a, n.2).

Equally as significant, in the Zola/Natco proceeding, com-

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[1] References are to decision of the Third Circuit here on review and to the Commission's decision which the Third Circuit affirmed, both of which are reproduced at the end of petitioner's initial petition to this Court.

menced in 1986, there was no evidence adduced that Mr. Zola had been the alter ego of AAACon. The sole evidence of his alleged alter ego status was adduced in the AAACon proceeding to which Mr. Zola was not a party.

II

THE COMMISSION HAS NO JURISDICTION TO SANCTION NON-LICENSEES

a) The Commission Has No Explicit Sanction Authority Over Non-licensees.

Until the decision of the Third Circuit below, the law was clear—no administrative agency has sanction powers over non-licensees unless: a) the agency had been granted by Congress authority to sanction "all persons"; and b) Congress had given the agency no alternatives such as court action to seek enforcement.

Prior to the decision below, the case law held that there were two classes of agencies: a) those, such as the Federal Trade Commission and the Department of Agriculture, which had been given jurisdiction by Congress over "all persons"; and b) those which had only limited jurisdiction over entities specified by statute such as licensees. Agencies in the latter category were required to go to court to obtain sanction orders against persons other than licensees (non-licensed individuals). The Interstate Commerce Commission belonged to this latter group of agencies, and Congress had provided the Interstate Commerce Commission with access to courts to obtain injunctions and sanctions against non-licensees in 49 U.S. Code Sec. 11702, 11703, 11901, 11906. Congress also gave the agency explicit authority over certain enumerated classes of non-licensees, cf. 49 U.S. Code Sec. 11701 and 10934 more fully discussed below.

b) Implied Sanction Authority Is A Radical Departure From Prior Law

This Court has often declared that sanction authority over non-licensees will not be implied. *Arrow-Hart & H. Elec. Co. v. F.T.C.,* 291 U.S. 587 (1934); *S.E.C. v. Sloan,* 436 U.S. 103 (1978). This is all the more true where the agency has adequate alternatives such as access to court enforcement. *C.A.B. v. Delta Airlines,* 367 U.S. 316 (1961). This rule has been heretofore followed by all circuits considering the issue.

Wallach v. S.E.C., 202 F.2d 462 (D.C. Cir. 1953); *Touche Ross & Co. v. S.E.C.*, 609 F.2d 570 (2d Cir. 1979).

As this Court has repeatedly noted, administrative agencies cannot claim, as the Commission has in the case here on review, implied sanction powers in addition to those explicitly granted by Congress "on the theory that this is necessary to render effective the prescribed statutory remedy." *Arrow-Hart v. H. Electric Co., supra,* at 598. Accordingly, the basis for the Third Circuit's decision here on review that the implied sanction authority of the Commission over the non-licensee was necessary to render the Commission's sanction of AAACon effective (24a) is in error.

The Third Circuit gave four rationales to support its expansion of implied agency authority. First, it relied on cases concerning those agencies which had been given explicit authority by Congress over "all persons," such as the Federal Trade Commission and Department of Agriculture.[2] These cases are clearly not in point because Congress never granted the Interstate Commerce Commission jurisdiction over "all persons."

Second, the Third Circuit relied on sanction cases arising under statutes, such as the Interstate Commerce Act where the sanction was applied directly to licensees, license applicants, or licensed practitioners before the agency.[3] Those cases do not support the proposition that any agency may enjoin non-licensees and others not explicitly subject to agency jurisdiction to effectuate its goals without going through judicial procedures.

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[2] *Bruhn's Freezer Meats of Chicago Inc., v. U.S. Department of Agriculture,* 438 F.2d 1332 (8th Cir. 1970); *Sebastopol Meat Co. v. Secretary of Agriculture,* 440 F.2d, 983 (9th Cir. 1921); *Guziak v. F.T.C.*, 361 F.2d, 700 (8th Cir. 1966), cert. den., 385 U.S. 1007 (1967); *F.T.C. v. Standard Education Society,* 302 U.S. 112 (1937); *Mattes v. U.S.*, 721 F.2d 1125 (7th Cir. 1983).

[3] *American Trucking Ass'n v. U.S.*, 344 U.S. 298 (1953); *Amoskeog v. I.C.C.*, 590 F.2d 388 (1st Cir. 1979); *I.C.C. v. American Trucking Assn's.*, 467 U.S. 354 (1984); *U.S. v. Chesapeake & Ohio R. Co.*, 426 U.S. 500 (1976); *Trans Alaska Pipeline Cases,* 436 U.S. 631 (1978); *Mattes v. U.S.*, 721 F.2d 1125 (7th Cir. 1983) concerned a sanction of an applicant for a license and, as well, a statute providing for agency sanction authority over "all persons."

Third, the Third Circuit relied on a statutory provision, 49 U.S. Code Sec. 10321, authorizing the Interstate Commerce Commission to conduct *investigations* of all persons. As noted heretofore, the authority to investigate does not imply the more significant authority to sanction. The Commission itself does not express confidence in this rationale.[4]

Finally, the Third Circuit relied on general language found in all enabling legislation for agencies, such as 49 U.S. Code 10321. However, the Third Circuit's interpretation of the scope of 49 U.S. Code Sec. 10321 conflicts with the decisions of other circuits which have repeatedly, and uniformly, rejected the suggestion by the Commission that general language authorizing that agency to effectuate national policy, 49 U.S. Code Sec. 10321, is the basis for supporting any implied sanction authority.[5]

Neither the Third Circuit decision nor the Commission reply brief to this Court has cited a single case in which an agency with no explicit sanction authority from Congress over "all persons" has been held to have implied authority to sanction non-licensed individuals.

The Third Circuit's determination, that all agencies are impliedly authorized to sanction individuals to effectuate agency orders opens up a pandora's box. There are no safeguards, such as those which Congress has provided to licensees (including the two-notice, two-hearing provisions of the Interstate Commerce Act 49 U.S. Code Sec. 10925); there are no guidelines on the scope and duration of the sanctions; and there is no Congressional input on these matters. Such a result is clearly inconsistent with the several admonitions issued by Congress in passing the Motor Carrier Act of 1980 such as that

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[4]It stated in its reply to this Court, "Even if the foregoing provisions do not expressly confer authority on the I.C.C. to enter a debarment order when necessary to effectuate a decision to revoke an operating license, the Commission has implied authority to enter such an order." (p. 12)

[5]*Global Van Lines v. I.C.C.*, 714 F.2d 1290, 1295 (5th Cir. 1983); *Central & So. Motor Freight v. I.C.C.*, 582 F.2d 113, 118 (1st Cir. 1978); and *Central Forwarding Inc. v. I.C.C.*, 698 F.2d 1266 (5th Cir. 1983).

". . . the Interstate Commerce Commission should not attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation enacted by Congress. . . ." *Sec.* 3(a) Pub.L. 96-296,

and

". . . the Commission is admonished to stay within the powers specifically vested in it by the revised law." *H.R. Rep. No. 1069, 96 Cong., 2d Sess. 10-11,* reprinted in 1980 U.S. Code Cong. & Av. News, 2283, 2292-93.

c) The Commission's Sanction Authority Over Non-Licensees Has Been Revoked.

The Commission's brief in opposition has misinterpreted and misreported the explicit revocation by Congress of sanction authority in prior law Section 42. Therein, Congress revoked any sanction authority over non-licensed individuals the Commission may have had. Contrary to the statement and partial quote in the Commission's reply brief, the amendments of 1978, in which prior law Section 42 was removed, was not simply a restatement or re-enactment of all prior substantive law. The characterization by the Commission of the 1978 legislation is inaccurate. Thus the Commission errs in stating (p.13 n.8) that the 1978 amendment merely was:

"designed to 're-state, without substance of change,' the laws previously in force."

Rather, Congress stated in the 1978 amendments that only those laws that were "replaced" were to be construed as not having been substantively changed. *Sec. 3 Pub.L. 95-473,* October 17, 1978, 92 Stat 1466, (a). To that end Congress enacted several tables of laws to indicate the status of prior laws: a) those provisions that were subsequently re-enacted; b) that provisions that were omitted but not repealed; and c) those provisions that were omitted and repealed. Section 42 is found in Table II which contained the provision that were both omitted *and repealed.*

In repealing prior law Section 42 Congress directed the Commission thereafter to go to court, under the Federal Rules of Civil Procedure, to seek sanctions against non-licensees.[6] It also gave the Commission immediate access to the courts for injunctions or other sanctions over non-licensed individuals which the Commission felt were necessary, in 49 U.S. Code Sec. 11702, 11703, 11901 and 11906. Accordingly, whatever tenuous argument the Commission might have adduced prior to the amendments for authority to sanction non-licensees was rebutted by the repeal of Section 42.

d) The Claim Of Implied Sanction Powers is Inconsistent With The Explicit Sanction Powers Granted by Congress

Moreover, other portions of the Interstate Commerce Act are inconsistent with the notion of implied sanction authority in the Commission over non-licensees. If Congress had intended to provide the Commission with sanction authority over all non-licensed individuals in 49 U.S. Code Sec. 10321, it would not have felt it necessary to authorize subsequently explicit sanction jurisdiction over specific classes of non-licensed individuals. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). Yet, in the 1986 amendments, 49 U.S. Code Sec. 11701, Congress gave the Commission sanction powers over the now non-licensed freight forwarders; and in the 1980 amendments to 49 U.S. Code Sec. 10934, Congress gave the Commission sanction powers over household goods movers agents who were not, and had never been, licensees.

e) The Decision Below Has Far Reaching and Dangerous Potential

To permit, as the decision below does, governmental agencies to have implied sanction authority is a dangerous precedent. It impinges on the civil liberties of all citizens and creates a potential for changing the relationship between governmental agencies which are an arm of the legislature and the judiciary. If all agencies may now sanction any individual without statutory limitations and safeguards whenever they deem it necessary to

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[6]The Federal Rules of Civil Procedure are not made applicable to Commission proceedings, they apply to Courts only. See FRCP Rules 1 and 81.

make their orders effective or more effective, the potential for suspension of protections and standards is great.

f) This Case Is Ripe For Review

The Commission suggests that, while it may not have sanction authority over non-licensed individuals, at least in *this* case its order should not be reversed. In its brief in opposition it suggests, (p. 14), that should "the issue arise more frequently, there is time enough for this Court to consider the issue presented after it has been more thoroughly deliberated in the Courts of Appeal." There are two errors in this approach. First, the suggestion ignores *petitioner's* right to have the law applied in *this* case. There is no measure of error that permits the agency to continue to issue sanctions beyond its jurisdiction for a period of time until the number of individuals sanctioned meets a particular quantum. The argument that this Court should await further abuse by administrative agencies before taking action makes no sense.

Secondly, since its decision in the Zola/Natco proceeding, the Commission itself has already utilized the Third Circuit's decision here on review to further expand its implied sanction power over other non-licensees. See: *M. Bulifant Trucking Inc.*, 1990 Fed. Carrier Cases Par. 37,783, p. 47,071, set forth in petitioner's supplemental brief. The dangerous precedent of the decision below will also be attractive to other agencies seeking to expand their authority without the necessity of obtaining congressional authorization.

III

MR. ZOLA HAS BEEN ACCUSED AND FOUND GUILTY IN A PROCEEDING IN WHICH HE WAS NOT A PARTY.

The Commission acknowledges that there was no notice to Mr. Zola in the AAACon proceeding (to which he was not a party) that his rights and status would be determined. See: 15a, and brief in opposition p. 11, n.6.

The Commission's rationale, adopted by the Court below, is that petitioner Zola had notice in the subsequent Natco proceeding that he was being charged with being the alter ego of AAACon. The defect in this reasoning is that in the Natco proceeding there was not a scintilla of evidence that Mr. Zola was

the alter ego of AAACon. Rather, as the Commission acknowledged, it relied exclusively on its findings in the earlier AAACon case that Mr. Zola was the alter ego of AAACon (15a).

While the Third Circuit stated that there was evidence "in the record," it erred in failing to observe that the evidence was not in the record *in the case before it,* as the Commission decision acknowledged (31a). The concept is that petitioner Zola was told in the Natco proceedings, commenced in 1986, that he was then bound by the Commission's findings in the AAACon proceedings, which had closed in 1984, is unconstitutional. It denies petitioner Zola due process. It is also inconsistent with the teachings of this Court in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969); *Martin v. Wilks,* 109 S.Ct. 2180 (1989); and *Regents of Georgia v. Carroll,* 338 U.S. 586 (1949). A person may not have his status determined in a proceeding in which he is not a party in violation of the constitutional requirement that parties be notified when they are being charged with wrongdoing.' Cf. *In Re Ruffalo,* 390 U.S. 544 (1968).

IV

A REVOCATION ORDER IS NOT AN INJUNCTION

Petitioner has been charged with wrongdoing in failing to go out of the automobile transport business after AAACon's license was revoked. That revocation did not contain any injunctive language. It did not order anyone to do anything. The language of the revocation order is "AAACon's license is . . . revoked." The Commission's reply brief does not challenge the law that injunctions must be clear on their face and may not be implied *International Longshoreman's Assoc. v. Marine Trade*

'As to the Commission's new claim in its responsive brief that Mr. Zola himself may have been a carrier, this was not a finding made by the court below. It was not alleged in the Zola/Natco proceedings by the Commission nor has Mr. Zola been accused of operating as a carrier without a license. Indeed, if Mr. Zola were a carrier, he would be entitled to the two-notice, two-hearing provisions all carriers are entitled to under 49 U.S. Code Sec. 10925, but which the Commission felt unnecessary to provide him with inasmuch as it declared him to be the "alter ego of AAACon" in the earlier AAACon case.

Assoc., 389 U.S. 64, 76 (1967), nor does it defend that Third Circuit's finding that the AAACon revocation contained an "implied" injunction, (20a), which impliedly enjoined petitioner Zola.

Injunctions must be clear on their face so that persons know what is required of them and what is prohibited. The revocation of a corporation's license does not contain or imply injunctive language. *Regents of Georgia v. Carroll,* 338 U.S. 586 (1949); *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F.2d 240 (2d Cir. (1980) cert. den. 101 S. Ct. 105. To find, as the Third Circuit does, that it impliedly directed petitioner Zola not to purchase the stock of another carrier, or to conduct operations (however free of anti-consumer activity they may have been) is nowhere to be found.

Revocation of licenses cannot be expanded to injunctions. The agency must make any injunctive order it issues clear and specific. It failed to do so in the AAACon case and it may not sanction Mr. Zola subsequently for what it intended to include in the AAACon order, but did not. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters,* 415 U.S. 423 (1974).

Respectfully submitted,

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